ASSETS INVESTMENTS PTE LTD

v.

OSK SECURITIES BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8 (D3)-22-543-93]
16 SEPTEMBER 2005

TORT: *Misrepresentation - Duty of care - Losses incurred by plaintiff following share swap transaction - Defendant's representations induced plaintiff to enter transaction - Whether defendant a mere introducer - Failure to disclose defendant stood to gain additional commission - Whether defendant owed a duty of care to plaintiff both in contract and in tort - Whether defendant expected to exercise reasonable skill in its duties to the plaintiff - Whether there was a breach of duty - Whether defendant could raise illegality issue - Whether defendant liable for loss suffered*

CONTRACT: *Breach - Implied term - Implied term to exercise reasonable care and skill - Defendant to procure and manage an asset swap transaction with a third party - Duty of care - Losses incurred by plaintiff following share swap transaction - Defendant's representations induced plaintiff to enter transaction - Whether defendant a mere introducer - Failure to disclose defendant stood to gain additional commission - Whether defendant owed a duty of care to plaintiff both in contract and in tort - Whether defendant expected to exercise reasonable skill in its duties to the plaintiff - Whether there was a breach of duty - Whether defendant could raise illegality issue - Whether defendant liable for loss suffered*

This was the plaintiff's claim for damages for losses suffered following a share swap transaction. In March 1992, Konsortium Enterprises ('Konsortium'), a company affiliated with the plaintiff, approached the defendant for a loan of RM10 million. The facility offered was an asset swap transaction and one Qwinzy Group in Hong Kong offered the facility. In support of the RM10 million loan, 23 million Metroplex shares must be sold with the option to the plaintiff or Konsortium to buy back. The plaintiff or Konsortium was required to service option fees. For services rendered the defendant's management fee was 1% of the net value of the asset swap. Some time in May 1992, the plaintiff replaced Konsortium and proceeded with the said transaction. The

defendant recommended United Islamic Investments Foundation ('UIIF') as the third party who will buy the shares from the plaintiff. A sale and purchase agreement was subsequently entered into between the plaintiff and UIIF where the plaintiff had agreed to sell and UIIF to purchase 23 million Metroplex Berhad shares at a price subject to the terms stated within. Subsequently the plaintiff made five monthly option instalments of HK$326,663.88 each from November 1992 to March 1993 in accordance with cl.14 of the sale and purchase agreement.

However, through their letter dated 14 January 1993, UIIF and Qwinzy declared the option null, void and invalid. In the letter, Qwinzy, on behalf of UIIF said that the bank draft was "unacceptable as a valid payment as the name of the payee is incorrect." Meanwhile, the value of the Metroplex Berhad shares had risen from RM0.720 to RM0.860 in the KLSE on 1 December 1992. By May 1993, the shares had risen to RM1.80 each, compared to RM0.75 sen when the shares were sold in the asset swap transaction. The defendant's conduct of not immediately informing the plaintiff of any discrepancy or disparity in the draft had prevented the plaintiff from making alternative arrangements for the option instalment. Because of this the plaintiff could not exercise its option to buy back the shares and thus suffered losses. The plaintiff brought an action against UIIF, Qwinzy and Oxbridge Investments in the Hong Kong courts and a consent judgment was entered. The plaintiff before this court claimed that the defendant had misrepresented to the plaintiff that Qwinzy, UIIF and Oxbridge were reputable companies with known track records in the industry. The defendant in its amended defence denied that it had made any misrepresentation that had caused the plaintiff to suffer losses.

The plaintiff submitted these issues for the court's determination: (1) whether the defendant owed any duty in contract; (2) whether the defendant owed the plaintiff any duty of care in tort; (3) whether defendant was in breach of such duties; (4) whether losses suffered by plaintiff were caused by such breach of duty; (5) whether transaction was tainted with illegality and (6) how much is the quantum of damages that the defendant is liable to pay the plaintiff.

Held (granting damages in favour of plaintiff):

[1] The plaintiff must prove that there existed a contractual relationship between the parties. In the absence of express terms in a written formal agreement, such a relationship could be gleaned from the intention of the parties. The correspondence between the parties herein had sufficiently evinced this fact. The terms of the agreement as implied from the said correspondence stipulated that the defendant, for a 'management fee' would procure and manage an asset swap transaction with a third party. (pp 416 h & 417 a)

[2] The defendant was not a mere introducer. The defendant through DW1 had failed to disclose that it stood to gain additional commission from the plaintiff, apart from a 0.375% rebate as well as from Qwinzy. The court found that the defendant owed a duty of care of the plaintiff both in contract and tort. (p 417 b & e-f)

[3] The defendant had done more than merely hand over to the plaintiff photocopies of brochures of UIIF and Oxbridge. It had made oral representations that Qwinzy was financially strong and stable and that the persons running Qwinzy were honest, reliable and were of high integrity. The representations and assurances were made to instill a sense of confidence to the plaintiff. The fact that both DW1 and one Steven Ho on behalf of the defendant stood to gain secret profit from Qwinzy fortified the probabilities of the plaintiff's case. (p 418 b-d)

[4] The defendant was expected to exercise reasonable skill, care and judgment in carrying out its duties for the plaintiff. It was their duty to ascertain the representation made by Qwinzy before assuring the plaintiff. The defendant should ascertain with reasonable certainty the accuracy of facts transmitted to the plaintiff. The defendant must also exercise reasonable care and judgment when giving advice. However, the defendants herein did not have competent knowledge of the mechanics of the assets swap. It was from this breach of duty that the defendant was liable for the loss suffered. (p 418 e-f)

[5] The defendant had suggested that the asset swap transaction was illegal as it had contravened the Exchange Control Act 1953, particularly Regulation ECM10 which regulates the foreign currency credit facilities and ringgit credit facilities from non-residents. The defendant had failed to prove its allegation. The defendant as a reputable stockbroking firm knew or ought to have known of the requirement of the Exchange Control Regulations. It was their reputation that imparted a sense of confidence in the plaintiff to proceed with the asset swap. It was on the defendant's suggestion a foreign company was used to circumvent and they could not now use this illegality defence to their advantage. It was the defendant's duty to advise the plaintiff of any exchange control regulation that must be fulfilled. Here also the defendant had breached their duty of care to the plaintiff. The defendant could not raise the illegality issue. It was not right for the defendant to advise the plaintiff to enter into this transaction and subsequently raise illegality when sued. (pp 418 h & 419 a, g-h)

[6] There was causation in the sense that it was the defendant who caused the plaintiff to enter into a relationship with Qwinzy and subsequently the asset swap transaction with UIIF. The recommendation was one that transcended mere introduction. It was one that was relied on by the plaintiff and the plaintiff had suffered losses as a consequence of it. The defendant's representations had induced the plaintiff to enter into the asset swap transaction. It was a step that exposed the plaintiff to risks. If the plaintiff had not been so induced by the defendant, the plaintiff would not have taken that step. (pp 420 f-g & 421 a)

[7] The court granted damages in favour of the plaintiff since it was satisfied that the damage was reasonably foreseeable and the loss suffered by the plaintiff was not too remote. From the evidence, the plaintiff had fulfilled the elements for the award of damages. The court was satisfied that the damage was reasonably foreseeable. There was a close and direct relationship of proximity between the parties. In such a situation it was fair, just and reasonable to impose the liability in tort on the defendant. Applying s. 74 Contracts Act and the common law for damages in tort as a result of the breach of duty in contract and in torts, the court took the lowest alternative figure of RM26,984,728.75 being the loss as at 29 March 1993 when plaintiff had accepted UIIF's wrongful repudiation with interest at 8% from date of filing of writ until realisation. (p 421 c)

[The court also awarded costs to the plaintiff.]

Case(s) referred to:

Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Other Appeals [2003] 1 CLJ 585 CA ***(refd)***

Banque Nationale De Paris v. Wuan Swee May [2000] 4 CLJ 387 HC ***(refd)***

Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568 ***(refd)***

Dr Abdul Hamid Rashid & Anor v. Jurusan Malaysian Consultants [1997] 3 MLJ 546 ***(refd)***

Galoo Ltd & Ors v. Bright Grahame Murray (a firm) & Anor [1995] 1 All ER 16 ***(refd)***

Glenie v. Mc D&C Holdings Ltd [1935] SCR 257 ***(refd)***

Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1963] 2 All ER 575 ***(refd)***

Henderson v. Merrett Syndicates Ltd [1995] 2 AC 145 ***(refd)***

Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd [1941] 2 All ER 165 ***(refd)***

Kenny & Good Pty Ltd MGICA [1992] 147 ALR 568 ***(refd)***

Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 ***(refd)***

Liverpool City Council v. Irwin [1977] AC 80 HL ***(refd)***

Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia [2001] 1 CLJ 740 CA ***(refd)***

Pan Global Equities Sdn Bhd v. Taisho Company Sdn Bhd [2005] 3 CLJ 734 CA ***(refd)***
Susan Field v. Barber Asia Ltd [2003] 712 HKCU 1 ***(refd)***
Tesco Supermarkets v. Nattrass [1971] 2 All ER 127 ***(refd)***
The Moorcock [1889] 14 PD 64 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Evidence Act 1950, s. 114(g)

For the plaintiff - Philip Chai; M/s Soo Thien Ming & Nashrah
For the defendant - Raja Addruse (Ranjit Singh & Jason Chan with him)

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:
The plaintiff in this case claims for damages for losses suffered following a share swap transaction. In March 1992, (Konsortium Enterprises ("Konsortium"), a company affiliated with the plaintiff, approached the defendant for a loan of RM10 million in the form of margin facility, against the security of shares in Meroplex Berhad. A meeting was held on 9 April 1992, between Freddy Yap Cheng Guan ("Mr Yap"), Senior Manager/Vice President, Corporate and Retail Dealings and Mr Steven Ho Fok Kiong, on behalf of the defendant and Mr Andrew Goh and Ms Lo Yin Fun on behalf of Konsortium. Mr Yap in evidence had explained that the facility offered was an asset swap transaction and not a Margin Facility. The Qwinzy Group in Hong Kong would be offering the facility. In support of the RM10 million loan, 23 million Metroplex shares must be sold with the option to the plaintiff or Konsortium to buy back. The plaintiff or Konsortium would be required to service options fees instead of interest. The scheme purported to offer a low interest rate and high margin. For services rendered, the defendant's management fee was 1% of the net value of the asset swap.

An application was made to Bank Negara for approval of the above transaction. Bank Negara did not approve it. Some time in May 1992 the plaintiff replaced Konsortium and proceeded with this transaction. The defendant recommended United Islamic Investments Foundation ("UIIF") as the third party who will buy the shares from the plaintiff. A sale and purchase agreement was subsequently entered into between the plaintiff and UIIF, where the plaintiff had agreed to sell and UIIF to purchase 23 million Metroplex Berhad shares at a price subject to the terms stated within.

Following this agreement, RM13,712.50 was paid by the plaintiff, and Qwinzy on behalf of the plaintiff paid HK$196,003.12 to the defendant for management services. The shares were to be delivered to UIIF or to Qwinzy on behalf of UIIF between 31 July 1992 and November 1992. UIIF, or Qwinzy on behalf of UIIF paid HK$32,559,738.75, the full amount for the shares, to the plaintiff. This is 50% of the quotation value.

To make sure that the option is open, the plaintiff made five monthly option instalments of HK$326,663.88 each from November 1992 to March 1993 in accordance with cl. 14 of the sale and purchase agreement. Qwinzy's representative acknowledged receipt of the banker's draft for the second option instalment when the plaintiff's representative telephoned him. The acknowledgement of receipt was even faxed to the plaintiff. However, through their letter dated 14 January 1993 UIIF and Owinzy declared the option null, void and invalid. In the letter, Qwinzy, on behalf of UIIF said that the bank draft was "unacceptable as a valid payment as the name of the payee is incorrect". It was rejected because the plaintiff had not put in the letter "s" after the word "Investment" in UIIF's name.

Meanwhile, the value of the Metroplex Berhad shares had risen from RM0.720 to RM0.860 in the KLSE on 1 December 1992. By May 1993, the shares had risen to RM1.80 each, compared to RM0.75 sen when the shares were sold in the asset swap transaction. The defendant's conduct of not immediately informing the plaintiff of any discrepancy or disparity in the draft had prevented the plaintiff from making alternative arrangements for the option instalment to be made by 1 December 1992. Because of this the plaintiff could not exercise its option to buy back the shares and thus suffered losses.

The plaintiff brought an action against UIIF, Qwinzy and Oxbridge Investments in the Hong Kong courts. A consent judgment was entered into between UIIF, Qwinzy, Amir Sharifiiddin Johan, Amir Steven Johan Limited and Logic Inc, in Hong Kong. Amir Sharifuddin Johan gave evidence for the plaintiff in this court.

The plaintiff, in its third amended statement of claim said that the defendant had misrepresented to the plaintiff that Qwinzy, UIIF and Oxbridge were reputable companies with known track records in the industry. The defendant, by distributing to the plaintiff misleading brochures and leaflets of these companies had failed to take reasonable steps to satisfy itself that they were capable of carrying out a transaction of such magnitude. All of them in fact had virtually no assets. UIIF for instance had no known directors. It operates under a power of attorney given to Mr Amir Sharifuddin bin Johan, who also held shares and is one of the two directors in Qwinzy.

The defendant in its amended defence denied that it had made any misrepresentation that had caused the plaintiff to suffer losses. The defendant suggested Asset Swap Transaction after it rejected Konsortium's application for margin facilities. This is after Konsortium had asked the defendant whether there are alternative means of obtaining facilities.

The defendant said that even though it had introduced Qwinzy Corporate Services Ltd., ensuring Qwinzy's viability or credentials are not its responsibility. Further, the 1% fee is not for management services. The fee is for introducing Konsortium to Qwinzy. The defendant merely acts as a conduit pipe. The transaction between Konsortium and Qwinzy was however not approved by Bank Negara. The defendant denies that it owed any contractual obligations to the plaintiff. The defendant claimed that it does not even know of the plaintiff's existence when the plaintiff was said to have taken Konsortium's place. Further, since Bank Negara did not approve the transaction between the plaintiff and Qwinzy, it was marred by non-compliance of the law.

This case was partially heard by the Commercial 3 Judge. All the witnesses on both sides had given evidence. The Commercial 3 Judge reclused himself from hearing the case and hence this case was transferred to this court. The parties agreed that I should hear this case de novo. The plaintiff called four witnesses and the defendant one.

The plaintiff's learned counsels, in their submissions listed six issues for the court's determination. They are firstly, whether the defendant owed the plaintiff any duty in contract and if so, what are those duties. Secondly, whether the defendant owed the plaintiff any duty of care in tort. This is in relation to the representations and assurances given by the defendant to the plaintiff. Thirdly, if the defendant owed such duties to the plaintiff, whether or not the defendant was in breach of such duties. Fourthly, whether any losses that the plaintiff suffered were caused by such breach of duty. Fifthly, whether the transaction is tainted with illegality. If so, whether the defendant is entitled to rely on such equitable relief. Lastly, how much is the quantum of damaqes that the defendant is liable to pay to the plaintiff.

On the first issue, the plaintiff's learned counsel submitted that there is a contract between the plaintiff and the defendant. It is by virtue of the agreement by the defendant to procure and manage an asset swap transaction with a third party for the plaintiff in consideration of which the plaintiff will pay the defendant a "management fee". The terms are derived from the correspondence between the plaintiff and the defendant on this matter. The principle that when there are no express terms in a contract, the court may imply a term in the contract is found in *The Moorcock* [1889] 14 PD 64 where Bowens LJ said:

> In business transactions, what the law desires to effect by implication is to give such business efficacy to the transaction as must have been intended by both parties as businessmen ...

In *Dr Abdul Hamid Rashid & Anor v. Jurusan Malaysian Consultants* [1997] 3 MLJ 546 at p. 554, James Foong J said:

> The principle of implied terms being read into any contract is well accepted in our courts and for it to be applicable certain conditions must be fulfilled. On these, Lord Simon in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v. Shire of Hasting* [1978] 2 ALJR 20 spelt them out as follows:
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> > In (their Lordships') view, for a term to be implied the following conditions must be reasonable and equitable: it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; it must be capable of clear expression; it must not contradict any express terms of the contract.

To illustrate that it is not unreasonable that a client would expect the stockbroker to exercise a degree of care in ascertaining the viability of a transaction, the plaintiff's learned counsel cited the case of *Glenie v. McD&C Holdings Ltd* [1935] SCR 257 [1935] DLR 561.

It was deduced from the above authorities that the following implied terms arose from the relationship between the plaintiff and the defendant. Firstly, the defendant must exercise reasonable skill and care and judgment in carrying out its duties for the plaintiff. It must ascertain that the parties involved in the asset swap transaction, namely Qwinzy, Oxbridge and UIIF are genuine parties. Secondly, the defendant must exercise reasonable skill and judgment to ascertain the representations made by Qwinzy are true before communicating them to the plaintiff and making assurances. Thirdly, the defendant must have adequate or competent knowledge of the mechanics of an asset swap transaction. Fourthly, the defendant must carry out all reasonable care and skill to determine the identities of the "Designated Principals" of Qwinzy and that the parties are competent to enter into the asset swap transaction. Fifthly, the Defendant must exercise all reasonable care and skill to ensure that the asset swap transaction does not contravene any laws or regulations of Malaysia, Singapore and the Turks and Caicos Islands.

From the implied terms, the plaintiff's learned counsel submitted that the defendant has an implied duty of care in contract to exercise reasonable care and judgment to the plaintiff.

On whether the defendant owe a duty in tort, the principle propounded by the House of Lords in *Medley Byrne & Co Ltd v. Heller & Partners Ltd* [1963] 2 All ER 575 was relied on. The principle in *Medley Byrne* was applied in the Malaysian case of *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 CLJ 740. In this case, certain representations were made which induced the respondent to invest in a company. The representations given were that the company was a respectable company and was of sound financial standing. It turned out that the company was not of sound financial standing and it went into receivership. The appellant admitted that they gave the representations but contended that their role was only of a finder and that the rest was between the respondent and the company. The Court of Appeal in that case held that:

> In the light of the position of the appellant as merchant bankers, they could not be heard to say they were playing the role of finder of purchasers of the shares of the company. Being merchant bankers, they owed a higher duty to the respondent than that of a mere finder. The appellant ought to ascertain and verify all information supplied by the company before passing on to the respondent. The respondent succeeded in establishing that the appellant owed a legal duty of care to the respondent and in making the representation, there was negligence which resulted in loss to the respondent.

To stress further on the point that the defendant owes a duty of care to the plaintiff, the plaintiff's learned counsel submitted the case of *Susan Field v. Barber Asia Ltd* [2003] 712 HKCU 1. In this case, the relationship was between an investor and a financial advisor. The court said: "... In general where the defendant assumes the responsibility of providing advice to a plaintiff and knows or ought to know that the plaintiff is likely to rely on that advice, a duty of care is likely to arise".

It follows that where a case is identified as falling within the *Hedley Byrne* principle, liability for economic loss is inevitable. The plaintiff's learned counsel seems to suggest this when referring to Lord Goff's speech in *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145: "... It follows that once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is "fair just and reasonable" to impose liability for economic loss ...".

In order to ascertain whether oral representations were made, the plaintiff's learned counsel referred to the evidence of the witnesses in the trial. PW1 had said that certain representations and assurances were made to the plaintiff at a meeting which was held on 9 April 1992 between Mr Andrew Goh (PW1), Ms Lo Yin Fun representing Konsortium Enterprise (M) Sdn Bhd and Mr Freddy Yap (DW1) with Mr Steven Ho for the defendant. However, DW1 denied ever making the representations and assurances.

The plaintiff's learned counsel proceeded to examine the credibility of PW1 and DW1. He contended that PW1 was more credible in that his answers were more forthright and straightforward when cross-examined by the defendant's counsel. DW1 was evasive and his answers do not reflect his position as Vice President of the defendant. To justify his shift from referring to the 1% fee from management fee to introduction fee, he said, "... I coined the phrase 'management services' for want of any other term I didn't know what other term to use". DW1 also said that "... in order for us to earn the fee we would have to do some "donkey work". DW1 also seemed to have a lapse of memory when asked whether he had met PW4 before the asset swap transaction.

PW2 has shed some light as to why PW4, Amir Sharifuddin bin Johan the person behind the entire scheme, had agreed to come and give evidence for the plaintiff. PW2 said that a compromise was struck between the litigants and since the plaintiff has allowed PW4 to keep his Hong Kong house, he agreed to testify for the plaintiff. From PW4's evidence and DW1's evidence under cross-examination, it was revealed that apart from obtaining the rebate of 0.375% from the plaintiff, the defendant stood to gain additional commission from the plaintiff. Learned counsel for the plaintiff said that failure to disclose that he stood to obtain commission from both Qwinzy as well as the plaintiff and the fact that a secret commission amounting to RM51,065.40 went into Freddy Yap's personal pocket shows that DW1 is not altogether honest and that his evidence should be viewed with some degree of suspicion.

As for not calling Ms Lo Yin Fun, the plaintiff's learned counsel said that it is not for the defendant to raise adverse inference since her witness statement had been served on the defendant which is consistent with the statement of PW1. If the defendant desires, an application could have been made to this court during the trial for the examination of this witness.

The plaintiff's learned counsel reiterated that representations and assurances were indeed made to the plaintiff. This is owing to the fact that at that material time, the plaintiff had only wanted a "margin facility". It never heard of or had any knowledge of an asset swap transaction.

Since the transaction involves a substantial amount of shares, the plaintiff would not have proceeded with the transaction had it not been for the representations and assurances, which were given by the defendant to the plaintiff. The plaintiff had not heard of, nor had any previous dealings with Qwinzy. If the defendant did not paint a rosy picture about Qwinzy to the plaintiff, taking into consideration the amount involved, it is unlikely that the plaintiff would proceed with the transaction.

During the meeting of 9 April 1992, Freddy Yap (DW1) and Ho gave Goh (PW1) and Lo the impression that the defendant had previously concluded several deals with Qwinzy and that they were fairly well known to the Defendant. Further, the defendant had represented that Qwinzy is financially strong and stable and that the persons running the operations of Qwinzy are honest, reliable and are of high integrity. When pressed further DW1 said for sure they are not crooks. The defendant made written representations in the form of a document entitled "Qwinzy Corporate Services Limited and photocopies of brochures of two companies known as Oxbridge Investments Ltd ("Oxbridge") and UIIF.

The plaintiff relied upon the representations and it proceeded with the application. The representations were subsequently found to be false. The defendant had not concluded any deals with Qwinzy before, and Asset Swap was a new concept even to Qwinzy. PW2, the solicitor who had conduct of the litigation against Qwinzy, Oxbridge, UIIF and others in Hong Kong has given evidence that the representations are false. PW3, Paul Bromberg, the investigator who carried out detailed investigation has also confirmed that the representations are also false. PW4, Amir Sharifuddin bin Johan has also testified that the representations relating to Qwinzy, Oxbridge and UIIF are false.

In answer to the defendant's allegation that the plaintiff ought to have made its own enquiries, the plaintiff's learned counsel said that it was impossible for the plaintiff to have carried out any worthy investigation or due diligence during the short span of time given. Furthermore, the plaintiff would not have proceeded with the transaction had the defendant, a well-known and reputable company, not recommended it.

The defendant alleged that the asset swap transaction is illegal as it has contravened the Exchange Control Act 1953, in particular, Regulation ECM10 which regulates the foreign currency credit facilities and ringgit credit facilities from non-residents. The defendant alleged further that the plaintiff had practised deception on a public authority, Bank Negara. The plaintiff's learned counsel submitted that the defendant did not cross examine the plaintiff's witnesses

particularly PW1 on this issue. There is no evidence upon which the defendant can make such an allegation against the plaintiff. The defendant could not prove its assertion against the plaintiff.

In any event the evidence had shown that plaintiff through Goh was ready to call off the deal when the letter of rejection was received from Bank Negara. However, it was the defendant who persuaded him to proceed with the deal, by suggesting the use of a foreign company. It became evident during the trial that the defendant was eager for the asset swap transaction to go through as soon as possible. The defendant, through Freddy Yap and Ho were obtaining additional commission from Qwinzy for the transaction, which was paid to them personally. They introduced the asset swap transaction to Goh even before they really understood the mechanics of the asset swap or had any real knowledge about the existence and identity of Qwinzy.

On causation, the plaintiff's learned counsel submitted that the accepted test is whether the defendant's fault caused the damage. It was submitted that it was the defendant who caused the plaintiff to enter into a relationship with Qwinzy and subsequently the asset swap transaction with UIIF. The defendant raised intervening factors which may have broken the causal link. They are firstly, UIIF wrongfully rejecting the Bank Draft for suspicious reasons. Secondly, the elaborate fraud of Johan, Qwinzy or UIIF. Thirdly, the fact that Johan or UIIF wrongfully repudiated the Asset Swap Agreement when the share prices soared. Fourthly, the fact that the plaintiff had taken legal proceedings against Johan, Qwinzy and UIIF in Hong Kong. There is an underlying nexus to all these factors. They resulted from and/or are linked to the veracity, integrity, standing, character and reputation of Qwinzy and Johan, both of whom were recommended by the defendant to the plaintiff.

The defendant argued that the transaction has inherent risks akin to two speculators in a derivative market. The plaintiff's learned counsel said that if the plaintiff had not been induced by the defendant to enter into the asset swap transaction, the plaintiff would not have been exposed to any risk. The plaintiff's learned counsel cited the case of *Kenny & Good Pty Ltd Mgica* [1992] 147 ALR 568, where the same argument was rejected. The court said: "The respondent would not have been exposed to any risk in consequence of a default had it not been induced to insure the transaction".

On damages, learned counsel for the plaintiff cited s. 74 of the Contracts Act 1950. As for damages under tort, the case of *Arab Malaysian Finance Berhad v. Steven Phoa Cheng Loon and Other Appeals* [2003] 1 CLJ 585 was referred to. The position in that case is that firstly, the general test is one of reasonable foreseeability. Secondly, the injury suffered by the plaintiff must not be too remote. Thirdly, economic loss may be claimed under certain

circumstances such as in the case of *Caparo Industries plc v. Dickman & Ors* [1990] 1 All ER 568 where the House of Lords approved three elements for a duty of care to exist. They are firstly, reasonable foreseeability. Secondly, a close and direct relationship of proximity between the parties. Thirdly, it must in such a situation be fair, just and reasonable to impose liability in tort.

The plaintiff claims for the amount of RM81,988,482.11 as damages for breach of duty in contract and in tort. In the alternative, the plaintiff claims for RM40,865,168.60, being the loss as at 31 October 1995 or the original completion date of the option if the repurchase of the shares had gone through. Further in the alternative, the lesser sum of RM26,984,728.75 being the loss as at 29 March 1993 the date of the acceptance of UIIF's wrongful repudiation. The plaintiff is also claiming for RM294,100 for wasted management time.

The defendant's learned counsel in his submissions denied that DW1 had given assurances or made the representations alleged by the plaintiff. Since DW1 has denied, it was submitted that the onus now lies with the plaintiff. The defendant's learned counsel cited the case of *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd* [1941] 2 All ER 165 at p. 179A. The principle in that case is that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who substantially denies it because a negative is usually incapable of proof. Thus, the defendant's learned counsel raised an adverse inference under s. 114(g) of the Evidence Act against the plaintiff for not calling Lo Yin Fun, even though she is a material witness. She was there during the meeting with PW1 and DW1. It was PW1's evidence that Ms Lo attended all the important meetings.

On the plaintiff's contention that there was an implied contract that the defendant would act and provide management services only for Konsortium (and the plaintiff), the defendant's learned counsel said that there is no evidence to show that the defendant had ever acted for UIIF or Qwinzy in the Asset Swap Transaction. The defendant is acting as a channel of communication between the plaintiff and Qwinzy. Even then, it is only up to the stage just before the sale and purchase agreement and power of attorney were executed between the plaintiff and UIIF. The defendant was no longer involved after that, even as a conduit for communication. DW1 had given evidence that the 1% charged is introduction fee. At the insistence of PW1, he had to do some "donkey work" to earn the fee.

The defendant's learned counsel also raised the issue that PW4 is not a witness of truth. PW4 had agreed that he had wrongfully repudiated the plaintiff's option rights. He decided to repudiate on a minor technical ground that Qwinzy could not suffer more losses. He agreed that he lied to DW1 about UIIF. He also admitted creating falsehood in the Hong Kong action. PW2 confirmed this in his evidence.

The defendant's counsel said that it follows that PW4's evidence concerning the defendant's role in the Asset Swap Transaction is lacking in truth. This is particularly evident in his statement that the defendant is Konsortium's financial advisor and that he did not agree that the defendant was only introducing the 'borrower' to the lender.

Learned counsel for the defendant said that PW4's statement in Hong Kong action is more likely to be true, since it was made in 1993, closer to the event.

That statement was marked as D6. In that statement PW4 said at para. 11 that: "AIPL and Konsortium were introduced to us by Mr Freddy Yap of OSK. We had no personal contact with the clients, ie, AIPL and Konsortium, until upliftment of the shares".

Learned counsel for the defendant stood by DW1's evidence that the 1% charge is introduction fee since the term "management" is vague. He said that "management" does not mean investigation and advice.

The defendant's learned counsel said that there was no duty on the part of the defendant to make any inquiries or to so satisfy itself as to the financial soundness of UIIF or Qwinzy. This term which the plaintiff sought to imply does not meet the test of necessity as propounded by Lord Wilberforce in *Liverpool City Council v. Irwin* [1977] AC 80 HL: "... such obligation should be read into a contract as the nature of the contract itself implicitly requires, no more, no less: in other words, of necessity."

As to the plaintiff's contention that *Hedley Byrne* applies, the defendant's learned counsel invites the court to refer to the speeches of Lord Morris of Borth-y-Gest and Lord Reid. The speeches made it clear that the person who gives the advice or information must be someone possessed of a special skill and whose judgment and expertise (based on that special skill) is being relied upon by the person accepting the advice or information.

Learned counsel for the defendant said that the statements alleged to have been made by DW1 could not be considered as advice. They were no more than an expression of personal opinion. Counsel suggested that PW1, being a person of great experience in matters pertaining to finance should not have acted on the opinion without further inquiry. PW1 made inquiries with friends

in the banking circle but made no attempt to check with Qwinzy itself. The Hong Kong solicitor's evidence shows that the information on Qwinzy is readily available from a search at the Registry of Companies in Hong Kong. PW1 had ample time to do this. He had more than two months between the first application for the loan made by Konsortium (16 April 1992) and the execution of the power of attorney (3 July 1992). DW1 in fact asked PW1 to make his own inquiries.

In the Hong Kong action, the plaintiff's claim was grounded on representations in the brochures. The plaintiff cannot now say that it was the representations of DW1 and not the brochures that he had relied on. The brochures that he received on 25 May 1992 had no particulars of finances of Qwinzy, UIIF or Oxbridge. This should have prompted him to make further inquiries.

In order to succeed in this action the plaintiff must show that it is reasonable to rely on the defendant. In his own words, PW1 said that Chan Teik Huat is a shrewd and careful businessman. There is nothing in the UIIF brochure that shows UIIF had a US$10 billion paid up capital. At the most it shows that UIIF was not yet funded. There is nothing in the brochure to connect UIIF with asset swap transactions. The wording at the end of the brochure says it all: ".. If you would like to contribute to the foundation, please complete the attached voluntary donation card." Its main purpose was to elicit donations and nothing else. Why UIIF is incorporated in Turks and Caicos, a territory that is least heard of, with a small population of mostly Christians and not any Islamic Country is something which should have raised Mr Chan Teik Huat's suspicions.

In order to rely on the *Hedley Byrne* principle, learned counsel for the defendant said that the plaintiff must have suffered damage as a result of relying on the alleged negligent misstatement. Here, the plaintiff merely said that PW1 was induced by DW's alleged misrepresentation. Since Chan Teik Huat was the beneficial owner of all the issued and paid up capital of the plaintiff and the directing mind of the plaintiff. It is he who should be shown to be induced by the alleged representations of DW1. The plaintiff failed to do this.

The defendant's learned counsel denied the plaintiff's contention that there is a breach of statutory duty on the part of the defendant since no particulars were given. The defendant's learned counsel also raised the issue of the bank draft rejection by UIIF, citing that it is essential to the plaintiff's case. The defendant denied that the repudiation was wrongful and said that the plaintiff had not adduced sufficient evidence to show that it was.

Applying the principle in *Galoo Ltd & Ors v. Bright Grahame Murray (a firm) & Anor* [1995] 1 All ER 16, the defendant said that the predominant cause for the plaintiff's loss was not the defendant's actions but rather the elaborate fraud of Amir Johan, Qwinzy and UIIF. It is also contributed by Amir Johan's decision to reject the bank draft. The defendant contended that it was the plaintiff's fault that the bank draft was rejected since they did not spell UIIF's name correctly. The defendant's learned counsel said that the plaintiff's alleged loss had nothing to do with the financial soundness or otherwise of UIIF. The plaintiff took the risk by agreeing to and allowing UIIF to sell the shares. By doing so, the plaintiff had assumed the risk of Amir Johan's, Qwinzy's or UIIF's actions. The defendant said that it has no connection to this chain of events. The defendant's learned counsel said that when parties understood and engaged each other in the Assets Swap transaction, they are very much akin to two speculators in a derivative market.

On the plaintiff's claim of RM81,988,482.17, based on the Hong Kong consent judgment, the defendant's learned counsel said that the plaintiff cannot base its claim on the judgment which the defendant was not privy to. On wasted management time, a bare statement of purported time and costs incurred is not sufficient. The plaintiff must produce primary evidence of hours spent and actual fees incurred. Defendant's learned counsel did not agree with the plaintiff's formula for calculating the alternative claim of the share prices. Since what the plaintiff had was an option to purchase shares at a given value, the measure of damages, for the non-delivery of shares is the market price of the shares at the contractual time of delivery less the contract price.

I have heard witnesses from both plaintiff and defendant and the submissions of their learned counsels. I must say that both counsels had taken great pains in narrowing down the issues and canvassing them in minute detail. Their effort has assisted me in the determination of the issues very clearly.

I find that PW1 is a witness of truth and I could see no reason not to believe his testimony. He gave evidence on how the plaintiff came to get entangled in this whole scenario. His evidence traces the facts of the case, from the time that Konsortium approached the defendant right down to the moment when it finally dawned on the plaintiff that it had invested in a company with virtually no tangible assets or actual business.

Plaintiff must prove that there existed a contractual relationship between the parties. In the absence of express terms in a written formal agreement, such a relationship can be gleaned from the intention of the parties. In this case, I find that the correspondence between the parties had sufficiently evinced this

fact. The terms of the agreement as implied from the said correspondence stipulated that the defendant, for a "management fee", would procure and manage an asset swap transaction with a third party.

I find that the defendant, from its oral representations to the plaintiff, owed a duty of care to the plaintiff both in contract and tort. I disagree with the defendant's contention that it is a mere introducer and that the fee paid by the plaintiff is "introduction fee" instead of "management fee". I do not accept the defendant's explanation through DW1 that he had used the term "management services" for want of any other term since he did not know what other term to use. He had used that term and it is should follow that the fees payable would not be anything less than that for management services. I also find that DW1 is not forthright when he referred to services rendered by the defendant as "donkey work". From this I observed that DW1 would use any term that would distance the defendant away from any involvement with Qwinzy or UIIF's.

As for PW4, Amir Sharifuddin bin Johan, the fact that he is the central figure behind the whole quagmire does not make his evidence any less credible. PW4's evidence must be subjected to closer scrutiny, and the court must assess and may give it such weight that may be attached to it. If not to corroborate it may as in this case be used to lend support to the testimony of PW1. His evidence had revealed in reasonable detail the defendant's role in the transaction. From the circumstances of this case I find that the defendant is not a mere introducer. DW1 stood to gain additional commission from the plaintiff, apart from a 0.375% rebate. The defendant through DW1 has failed to disclose this especially the fact that he stood to gain commissions from both Qwinzy as well as the plaintiff. This, and the fact that defendant had not revealed that Mr Yap also receives directly RM51,065.40 as secret commission gives rise to a suspicion that the defendant had intended to keep all these under wraps.

I am unable to agree with the defendant's learned counsel that an adverse inference should be raised against the plaintif for its failure to call Ms Lo Yin Fun. The representations was made to PW1 in the presence of Ms Lo. Her witness statement was filed in court but she was not called. Adverse inference would be made when a party failed to call the principal persons involved and who is in a position to give a first hand account of the matter in controversy. The evidence of Ms Lo would corroborate and add credence and consistency to plaintiff's case. This does not mean that if she is not called the court should invoke s. 114(g) of the Evidence Act. It is not the law that a certain number of witnesses must be called by a party who carries the burden of proving its

case (See *Pan Global Equities Sdn Bhd v. Taisho Company Sdn Bhd* [2005] 3 CLJ 734. The case has to be decided on the evidence and whether plaintiff had discharged the burden of proof. Even the defendants themselves did not call Steven Ho. The case rest primarily on PW1 evidence as against DW1.

The defendant had done more than merely hand over to the plaintiff photocopies of brochures of UIIF and Oxbridge. If they had only done that, then of course the defendant would be justified in saying that the plaintiff should have conducted their own investigations. I find as a fact that the defendant had made oral representations that Qwinzy is financially strong and stable and that the persons running Qwinzy are honest, reliable and are of high integrity. This is in addition to the said photocopies of brochures that the defendant had given the plaintiff entitled "Qwinzy Corporate Services Limited". I am satisfied that these representations and assurances were made to plaintiff through PW1 by DW1. The representations and assurances were made to instil a sense of confidence to the plaintiff. I would add that the fact both DW1 and Steven Ho stood to gain secret profit from Qwinzy fortify the probabilities of the plaintiff's case. I accept that plaintiff accepted and relied on the information.

The defendant is expected to exercise reasonable skill, care and judgment in carrying out its duties for the plaintiff. It is their duty to ascertain the representation made by Qwinzy before assuring the plaintiff. The defendant should ascertain with reasonable certainty the accuracy of facts transmitted to the plaintiff. The defendant also must exercise reasonable care and judgment when giving advice. These duties of care in law are as propounded in *Hedly Byrne and Heller* and applied in *MIMB v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia.* The defendant themselves do not have competent knowledge of the mechanics of the assets swap. It is from this breach of duty that the defendant is liable for the loss suffered.

The plaintiff called witnesses to testify that representations relating to Qwinzy, Oxbridge and UIIF are false. The witnesses are PW2, the solicitor who had conduct of the litigation against Qwinzy, Oxbridge and others in Hong Kong, PW3, Paul Bromberg, the investigator and PW4, Amir Sharifuddin bin Johan from UIIF. Their testimony conclusively proved the falsity of the representations.

The defendant had suggested that the asset swap transaction is illegal as it has contravened the Exchange Control Act 1953, particularly Regulation ECM10 which regulates the foreign currency credit facilities and ringgit credit facilities from non-residents. It was also alleged that the plaintiff had practised deception on a public authority, Bank Negara. I find that the defendant as the party alleging this particular point has failed to prove its allegation. There is no

evidence on which this allegation could stand or be conclusively determined since the defendant had failed to raise it in their pleadings nor raised it in the cross examination of PW1 for plaintiff to address it as a substantive issue. This transaction is a share swap by a sale and purchase with an option to repurchase. I agree with learned counsel for the plaintiff that regardless of what interpretation any other person may say of this transaction, no finding has been made by any authority that the transaction is a borrowing and hence caught under the provisions of ECM10.

ECM10 applied to borrowings by residents of Malaysia from a non resident. The definition of resident then in 1992 was "a business (whether body corporate or not and whether head office or branch) established and operating in Malaysia." The operative words are "established" and "operating" which should be read conjunctively. The plaintiff is incorporated in Singapore. There is no evidence that plaintiff is operating in Malaysia. The fact that the plaintiff had been sending and receiving correspondences from an address in Malaysia does not *per se* mean that the company is operating from Malaysia.

ECM10 was amended in 1994 where the words 'resident' had been defined to mean "incorporated or registered with or approved by any authority in Malaysia." It therefore follows that ECM10 should only apply to companies incorporated in Malaysia as the word 'established' under the pre-amendment to ECM10 is synonymous with the words 'incorporated' in the 1994 amendment of ECM10. *Keppel Finance Ltd v. Phoon Ah Lek* [1994] 3 MLJ 26 supports the contention that the Exchange Control Act does not *per se* prohibit resident in Malaysia borrowing foreign currency outside Malaysia. This is summed up appropriately by Abd Hamid Mohamad J (as he then was) in *Banque Nationale De Paris v. Wuan Swee May* [2000] 4 CLJ 387 where he said that if the borrowing takes place outside Malaysia no permission is required. The share swap transaction by the plaintiff was in Singapore.

The defendant as a reputable stockbroking firm knew or ought to have known of the requirement of the Exchange Control Regulations. It is their reputation that imparted a sense of confidence in the plaintiff to proceed with the asset swap. It was on the defendant's suggestion a foreign company was used to circumvent and they can't use this illegality defence to their advantage. This eagerness is explained by the fact that both Yap and Ho Wee obtaining additional commission personally. It is the defendant's duty to advise plaintiff of any exchange control regulation that must be fulfilled. Here also the defendant had breached their duty of care to the plaintiff. It is an affront to public conscience for the defendant to raise this illegality issue. It is not right for the defendant to advise the plaintiff to enter into this transaction and subsequently raised illegality when sued.

I find from the evidence that the plaintiff, through Goh, was ready to call off the deal when the letter of rejection was received from Bank Negara. However the defendant through Yap had been persistent in procuring the plaintiff's involvement in the asset swap transaction without themselves understanding the mechanics of the transaction or ascertaining the identity of Qwinzy. Yap as the Vice President of the Corporate and Retail Services Department of the defendant had painted a rosy picture of Qwinzy. It was Yap who suggested to Goh to use a foreign incorporated company and this caused the plaintiff to proceed with the transaction, involving a substantial amount of shares and consequently suffered losses.

The learned counsel for defendants had submitted that Mr. Chan Teik Huat is the directing mind of the plaintiff and it is he who must be induced by the representations and cited *Tesco Supermarkets v. Nattrass* [1971] 2 All ER 127. I am in agreement with the plaintiff that no evidence had been laid before the court to suggest that PW1 is not one of the persons who may be the 'directing mind' of the plaintiff. There is insufficient evidence to enable any inference to be drawn against PW1. On the contrary the evidence tends to suggest that he has influence and control over the financial matters which may affect the company. PW1's duty includes financial investment activities and it is part of his duty to see that the investments are not a risk to the plaintiff.

I also find from the evidence that damages had occasioned as a result of the defendant's representations. To determine the quantum of damages, I agree with the plaintiff's learned counsel that the accepted test is, "Did the defendant's fault cause the damage?" There is causation in the sense that it was the defendant who caused the plaintiff to enter into a relationship with Qwinzy and subsequently the asset swap transaction with UIIF. The defendant had given four factors that it felt could have broken the causal link. In my opinion the defendant had failed to do just that. I am satisfied that the rejection by UIIF of the bank draft, the fraud of Johan, UIIF and Qwinzy, Johan repudiating the transaction when the share prices soared and the Hong Kong proceedings against the three of them are inextricably linked to the veracity, integrity, standing, character and reputation of Qwinzy and Johan. It was the defendant that recommended both of them to the plaintiff. The recommendation is one that transcends mere introduction. It is one that was relied on by the plaintiff and the plaintiff suffered losses as a consequence of it.

I am also satisfied that the defendant's representations had induced the plaintiff to enter into the asset swap transaction. It was a step that exposed the plaintiff to risks. If the plaintiff had not been so induced by the defendant, the plaintiff would not have taken that step. This was aptly put by the court in *Kenny & Good Pty Ltd v. Mgica* [1992] 147 ALR 568, "The respondent would not have been exposed to any risk in consequence of a default had it not been induced to insure the transaction".

I granted damages in favour of the plaintiff since I am satisfied that the damage is reasonably foreseeable and the loss suffered by the plaintiff is not too remote. From the evidence it is clear that the plaintiff has fulfilled the three elements for the award of damages. I am satisfied the damage is reasonably foreseeable. There is a close and direct relationship of proximity between the parties. I also felt that in such a situation it is fair, just and reasonable to impose the liability in tort on the defendant. Applying s. 74 Contracts Act and the common law for damages in tort as a result of the breach of duty in contract and in torts, I took the lowest alternative figure of RM26,984,728.75 being the loss as at 29 March 1993 when plaintiff accepted UIIF's wrongful repudiation with interest at 8% from date of filing of writ until realization.

The plaintiff's claim for wasted management time is rejected. I also awarded costs to the plaintiff.